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SEGARAN CHELLAMUTHU v. PENGERUSI, LEMBAGA PENCEGAHAN JENAYAH & ORS

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CRIMINAL APPLICATION NO: 44-12-08-2015]
B 1 MARCH 2016

PREVENTIVE DETENTION: *Detention order – Validity of – Habeas corpus – Application for – Whether detention order made without benefit of specific reports – Whether detention order defective – Failure to comply with procedural*
C *requirements – Whether rendered detention order invalid – Prevention of Crime Act 1959, s. 19A(1)*

The applicant was detained pursuant to an order issued by the Prevention of Crime Board ("Board") under s. 19A(1) of the Prevention of Crime Act 1959. The Board directed that the applicant be detained for a period of
D 24 months at the Pusat Pemulihan Khas Simpang Renggam, Johor. The applicant challenged the legality of the detention and applied for the issue of a writ of *habeas corpus*. The applicant contended that the detention order was defective as it had made no reference to the report of the inquiring officer under s. 10 nor the outcome of any review under s. 11. According to the
E applicant, by reason of that omission, the detention order was bad on the face of it and amounted to a procedural non-compliance. The applicant also submitted that the grounds of detention fell outside the scope of s. 19A(1).

Held (allowing application):

F **(1)** The preconditions to the exercise of the power to make a detention order are part of the decision making process and amount to procedural requirements. A failure to comply with these requirements rendered the detention invalid. This view was in conformity with the basic principle that preventive detention without a judicial trial was a serious
G deprivation and invasion of personal liberty, and it was imperative that strict compliance with statutory requirements must be observed in depriving a person of his liberty. (para 17)

(2) The report of the inquiring officer under s. 10 and the outcome of any review under s. 11 are conditions precedent to the exercise of the
H discretion under s. 19A(1). They thus constitute a procedural requirement governing the making of a detention order. As the detention order does not indicate whether these reports were considered, it gave doubt if the detention order was made without the benefit or due consideration of these two reports. This amounted to non-compliance
I with a procedural requirement in the making of the detention order and rendered the order invalid. This was sufficient to decide the matter in the applicant's favour. (paras 18 & 19)

(3) Section 19A(1) provides that a person can be detained on three grounds (elements) *ie*, for 'public order', 'public security' or 'prevention of crime'. The omission to state 'public order' and 'prevention of crime' in the grounds of detention was not a mandatory procedural requirement. It was patently clear that when the detention order and the grounds of detention were read together, it indicated that the Board was satisfied that the detention of the applicant was necessary in the interest of public order and the prevention of crime, based on the facts stated in the grounds of detention. (paras 20 & 21)

(4) The omission to specify the reports that the Board had considered in making the detention order was a fatal flaw for being contrary to the procedure laid down in s. 19A(1). These are preconditions to the exercise of power under this section and constituted part of the decision making process. The consideration of the two reports amounted to a procedural requirement governing the exercise of discretion by the Board in making a detention order. The detention order made against the applicant could not be said to be one that had been validly made. The application for the issuance of a writ of *habeas corpus* for the applicant's release was accordingly allowed. (para 22)

Case(s) referred to:

Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors and Another Appeal [2005] 4 CLJ 445 FC ***(refd)***

Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 HC ***(refd)***

Kumareshan Subramaniam v. Dato' Chor Chee Heung & Anor [2003] 4 CLJ 116 HC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(refd)***

Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan [2006] 4 CLJ 703 FC ***(refd)***

Zali Shariff v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [2004] 5 CLJ 296 HC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)
Prevention of Crime Act 1959, ss. 10, 11, 19A(1)

For the applicant - S Sundarajan; M/s Sundarajan & Assocs
For the respondents - Suzanne Tiyon Bimen; FC, Ministry of Home Affairs

Reported by Suhainah Wahiduddin

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JUDGMENT

SM Komathy JC:

[1] This is an application by Segaran a/l Chellamuthu for the issue of a writ of *habeas corpus*. He is presently detained pursuant to an order issued by the Prevention of Crime Board ("Board") under s. 19A(1) of the Prevention of Crime Act 1959.

[2] It is not in dispute that on 27 April 2015, the Board directed that the applicant be detained for a period of 24 months from that date at the Pusat Pemulihan Khas Simpang Renggam, Johor. The applicant challenges the legality of his detention.

[3] Section 19A(1), reads:

> ... The board may after considering the report of the Inquiry Officer submitted under section 10 and the outcome of any review section 11, direct that any registered person be detained under a detention order ... if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime ...

[4] A perusal of s. 19A(1) shows that the Board is empowered and may direct that a registered person be detained without trial for up to two years. The exercise of this power is subject to two conditions, first, the Board must consider the report of the inquiring officer submitted under s. 10 and the outcome of any review under s. 11. Upon considering the two matters, the Board can proceed to make a detention order if satisfied that detention is necessary in the interest of public order, public security or for the prevention of crime.

[5] The applicant advanced two grounds in support of his application. First, that the detention order made by the Board against him is *ex facie* bad as it did not comply with the conditions precedent stipulated in s. 19A(1); and secondly, that the grounds for detention fell outside the scope of s. 19A(1). Before I deal with these issues, it is necessary to examine the law on *habeas corpus*.

The Law

[6] In *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914, Abdul Hamid Mohamad FCJ writing for the Federal Court, clearly and succinctly set out the grounds on which a writ of *habeas corpus* can be sought. In this regard, he elucidated:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the

courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

[7] In *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan* [2006] 4 CLJ 703, the Federal Court elaborated the requirement of what amounts to procedural non-compliance:

A right to judicial review when there is a breach of a procedural requirement in the making of a detention order under the Act was considered by this court in *Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 FC in the following words:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 CLJ 649 (Rep); [1991] 2 CLJ 1199; [1991] 3 MLJ 28; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373; [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee.

[8] Based on the foregoing authorities, the detention order in the instant case can only be challenged by if there has been procedural non-compliance in the making of the order. In order address this question, the court needs to look at the provisions of the law or the rules that lay down the procedural requirements. See also *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 and *Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors and Another Appeal* [2005] 4 CLJ 445.

[9] With that in mind, I turn to consider the grounds on which the applicant seeks a writ of *habeas corpus*.

First Ground: Whether The Detention Order Is Defective

[10] The applicant contended that the detention order was defective as it made no reference to the report of the inquiring officer under s. 10 nor the outcome of any review under s. 11. By reason of this omission, the detention order was bad on the face of it. The Federal Counsel for the respondents disputed that the omission amounted to a procedural non-compliance. She

pointed out that as there was no statutory form for the drawing up of the detention order, the omission did not amount to procedural non-compliance. Both sides cited copious authorities in support of their respective positions.

[11] To have a proper understanding the rival submissions, the material portions of the detention order issued by the Board are set out:

> … Bahawasanya Lembaga Pencegahan Jenayah, berpuas hati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini bagi tujuan …
>
> (a) kepentingan ketenteraman awam*
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> (b) keselamatan awam*
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> (c) pencegahan jenayah*
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> Alasan yang atasnya perintah dibuat:
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> > … Penama ialah seorang ahli kumpulan yang melakukan kegiatan samun motolori/treler dengan bersenjatakan parang dan pisau di sekitar Johor dan Negeri Sembilan. Oleh itu, penama adalah termasuk dalam Kategori Yang Boleh Didaftarkan Perenggan 2, Bahagian 1, Jadual Pertama, Akta Pencegahan Jenayah 1959 [Akta 297].

[12] I interpolate to point out that s. 19A(1) is a new provision which came into force only recently in 2015. In the result, there are no reported decisions on the effect of a omission to expressly state in the detention order that the two reports specified in s. 19A(1) were considered. It would therefore be helpful to refer to case law which have considered a similar provision in the Dangerous Drugs (Special Preventive Measures) Act 1985.

[13] In *Kumareshan Subramaniam v. Dato' Chor Chee Heung & Anor* [2003] 4 CLJ 116, the applicant challenged his detention under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. He argued the that there was no statement in the detention order that it was necessary in the interest of public order that he be detained as required by s. 6(1). This omission constituted a procedural non-compliance. Jeffrey Tan J in accepting the argument said:

> The Minister must consider the complete report of investigation submitted under s. 3(3) and report of the Enquiry Officer under s. 5(4) before makes an Order. And further the court held "… the Minister may direct that a person be detained, if he is satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, if the Minister is satisfied that it is necessary in the interest of Public order that such person be detained. And there could be no two ways about it…
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> therefore, the Minister may direct that a person be detained only if he is satisfied on both counts. To state one and not state the other would only give the impression that the DO was made on the sole basis of the one stated prerequisite. The DO could not have informed the applicant that

the Minister was satisfied that it was necessary in the interest of public order that he be detained. The subsequent affidavit of the Minister stating the same was done after the detention had been challenged. It should have been done at the time of service of the DO.

[14] In the Federal Court case of *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687, the applicant was also detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. His Lordship Augustine Paul FCJ in delivering the judgment of the Federal Court held:

The reports specified in s. 6(1)(a) and (b) of the Act play a very significant role in the making of a detention order against a person and the Minister must consider these reports before making a detention order. They are therefore pre-conditions to the exercise of power under s. 6(1) of the Act and are part of the decision-making process and not the decision itself. Thus, they amount to procedural requirements governing the exercise of discretion by the Minister in making a detention order within the meaning of s. 11C of the Act, and a breach of this requirement is hence subject to judicial review. Therefore, if a report must be considered before making a detention order, it must be one that is in regular form. It follows that the report of the IO that the Minister must consider under s. 6(1)(b) of the Act must be one that has satisfied the requirements of s. 5 of the Act. Since there was no evidence of compliance with s. 5 of the Act in this case, the report under s. 6(1)(b) of the Act could not be said to have been made in accordance with law. Accordingly, the detention order made against the appellant could not be said to be one that had been validly made.

[15] However, in *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 Edgar Joseph Jr J took a contrary view:

The fifth point taken on behalf of the applicant was this: it was submitted that the detention order made by the Minister under s. 6(1) against him is bad on its face. In particular, it was argued that under s. 6(1) the Minister might make a detention order against any person the subject of the report of an Inquiry Officer under s. 5(4) provided that he is satisfied as to two matters, namely, (a) that the person concerned has been or is associated with any activity relating to or involving the trafficking in dangerous drugs and (b) that it is necessary in the interest of public order that such person be detained for a period not exceeding two years. But it was said that the detention order made against the applicant made no reference as to (b) and it was accordingly contended that by reason of this omission, the same was bad on the face of it.

Now, nowhere in the Act is there any provision as to the form which the detention order should take. However, it is clear, that a written order properly authenticated by the Minister is essential before any lawful detention can be effected for the Act clearly contemplates the making of a document. It is, however, I think essential that the detention order contain at least so much of the belief of the Minister in regard to a

A detainee as will inform him, in general terms, of the reasons for his detention so as to enable him to exercise, as soon as reasonably possible, his right to make representation to an advisory board under s. 9(1).

In the present case, I consider that the detention order notwithstanding the omission aforesaid complies with these requirements and I therefore fail to see how it could be said that it is thereby invalidated.

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[16] In *Zali Shariff v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [2004] 5 CLJ 296 Helliliah Mohd Yusof J echoed the same view:

In this respect I disagree with learned counsel of the applicant that the second part of s. 6(1) should be described the live wire. It would make more sense if the detaining order is communicated to the person in such a way that the purpose is understood as it is more in the form of first notice to the person to be detained. What is noticed however is that some of the cases where the order of detention (ie, not the grounds or facts) have been successfully impugned are in fact due to the addition of unnecessary words or surplus age which revealed a non-application of the mind to the facts of the case. As stated in *Karam Singh*'s case that detaining order is not to be equated to a charge ... Therefore the failure not to apply it, even if incorrect, does not invalidate or vitiate the procedure in the sense that since it is only a question of form it could not be said that the order has not been properly served on the *detenu*. Of more importance are the grounds and allegation of facts upon which the order is based. Those are the requirements which are mandatory ...

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I therefore find that the omission to refer to the second part of the s. 6(1) which I term as a recital or statement of purpose to be purely a technical error that does not render the whole order defective. In my view when we speak of an order while the recital does exist separately and distinctly from the part that relates to the grounds and allegation of facts, the fundamentals, that is, the grounds and allegation of facts would necessarily have to support the statement of purpose.

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[17] The authorities discussed above indicate that there is a conflict of judicial view on the subject. In the face of this conflicting judicial *dicta* on this issue, I am bound by and also am in full agreement with the *dicta* of Augustine Paul FCJ in *Muhammad Jailani Kasim* (*supra* [at 14]) that the pre-conditions to the exercise of the power to make a detention order are part of the decision-making process and amount to procedural requirements. A failure to comply with these requirements renders the detention invalid. This view, is in conformity with the basic principle that preventive detention without a judicial trial is a serious deprivation and invasion of personal liberty, and it is imperative that strict compliance with statutory requirements must be observed in depriving a person of his liberty.

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[18] In the present instance, the report of the inquiring officer under s. 10 and the outcome of any review under s. 11 are conditions precedent to the exercise of the discretion under s. 19A(1). They thus constitute a procedural requirement governing the making of a detention order. As the detention

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order does not indicate whether these reports were considered, it gives to doubt if the detention order was made without the benefit or due consideration of these two reports. This amounts to non-compliance with a procedural requirement in the making of the detention order and renders the order invalid.

[19] This is sufficient to decide the matter in the applicant's favour. It is therefore not necessary for me to examine in detail the second ground. However, as I have heard submissions from the parties, I shall offer some brief observations. The second ground is premised on the complaint that the grounds of detention (*supra* [at 9]) that was served on the applicant was inconsistent and did not reflect the grounds stated in the order for his detention. The grounds of detention stated that the applicant was a gang member who had committed armed robberies targeting lorries and trailers in Johor and Negeri Sembilan. There was no mention that his detention was for (a) public order and (b) prevention of crime as stated in the detention order. This discrepancy, it was contended, was fatal. The detention thus fell outside the scope of s. 19A(1).

[20] Section 19A(1) provides that a person can be detained on three grounds (elements) ie, for (a) "public order" or (b) "public security" (c) "prevention of crime". The Federal Counsel accepted that the detention order stipulated that the applicant's detention was for (a) public order and (b) prevention of crime, but these elements were omitted in the grounds of detention.

[21] The Federal Counsel, contended and I agree, that the omission to state "public order" and "prevention of crime" in the grounds of detention is not a mandatory procedural requirement. The contention of the applicant would have merit if this omission had been made in the detention order. It is patently clear when the detention order and the grounds of detention are read together, it indicates that the Board was satisfied that the detention of the applicant was necessary in the interest of public order and the prevention of crime, based on the facts stated in the grounds of detention.

[22] For the reasons stated, I conclude that the omission to specify the reports that the Board had considered in making the detention order is a fatal flaw for being contrary to the procedure laid down in s. 19A(1). These are preconditions to the exercise of power under this section and constitute part of the decision-making process. The consideration of the two reports amount to a procedural requirement governing the exercise of discretion by the Board in making a detention order. In the circumstances, the detention order made against the applicant cannot be said to be one that has been validly made. The application for the issuance of a writ of *habeas corpus* for his release is accordingly allowed.